

STATE OF NEW YORK  
DEPARTMENT OF STATE

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In the Matter of the Complaint of

**DEPARTMENT OF STATE  
DIVISION OF LICENSING SERVICES,**

Complainant,

**DECISION**

-against-

**DIANA DE SANTIS and DIANA & JOE'S  
DYNAMIC HAIR SALON INC.,**

Respondents.

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Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matter came on for hearing before the undersigned, Roger Schneier, on March 17, 1994 at the office of the Department of State located at 270 Broadway, New York, New York.

Respondent De Santis, of 647 Broadway, Massapequa, New York 11788, having been advised of her right to be represented by an attorney, appeared pro se on behalf of herself and the corporation.

The complainant was represented by Compliance Officer William Schmitz.

**COMPLAINT**

The complaint alleges that a hairdresser was observed working in the respondents' beauty parlor without her license being posted and with no photograph on her license.

**FINDINGS OF FACT**

1) Notices of hearing together with a copies of the complaint were served on the respondents by certified mail (Comp. Ex. 1).

2) Diana De Santis is duly licensed to operate a beauty parlor on behalf of Diana & Joe's Dynamic Hair Salon Inc. at 647 Broadway, Massapequa, New York.

2) On February 4, 1993 License Inspector Frances De Stefano conducted an inspection of the respondents' beauty parlor. She observed Laura J. Cullen, who at the time held a temporary license to engage in the practice of hairdressing and cosmetology, assisting in

giving a customer a permanent wave. Specifically, Cullen was rinsing out and blotting dry the hair of a person who was in the process of having a permanent wave administered by another hairdresser.

Cullen was working in the shop for the day as an applicant for a permanent position as a "shampoo girl."<sup>1</sup> Her license was taped to the side of De Santis' desk, in a location where it was not immediately visible, but where it could be seen by a customer who looked at the right angle while paying his or her bill.

#### **OPINION AND CONCLUSIONS OF LAW**

I- Pursuant to General Business Law §407[3], a license to engage in the practice of hairdressing and cosmetology must be kept posted in some conspicuous place in the beauty shop in which the licensee is employed. In this case, Cullen was employed, if at the time for only a single day, in the respondents' beauty parlor.

Cullen's license was posted. However, because it was not readily visible, and could be seen only by a customer who happened to look in the right direction while in the process of paying, it cannot be said that it was posted in a conspicuous place.

The charge is that the license was not posted. The evidence establishes that it was not conspicuously posted. However, so long as the issue has been fully litigated by the parties, and is closely enough related to the stated charges that there is no surprise or prejudice to the respondent, the pleadings may be amended to conform to the proof and encompass a charge which was not stated in the complaint. This may be done even without a formal motion being made by the complainant. Helman v Dixon, 71 Misc.2d 1057, 338 NYS2d 139 (Civil Ct. NY County, 1972). In ruling on the motion, the tribunal must determine that had the charge in question been stated in the complaint no additional evidence would have been forthcoming. Tollin v Elleby, 77 Misc.2d 708, 354 NYS2d 856 (Civil Ct. NY County, 1974). What is essential is that the "matters were raised in the proof, were actually litigated by the parties and were within the broad framework of the original pleadings." Cooper v Morin, 91 Misc.2d 302, 398 NYS2d 36, 46 (Supreme Ct. Monroe County, 1977), mod. on other grnds. 64 AD2d 130, 409 NYS2d 30 (1978), aff'd. 49 NY2d 69, 424 NYS2d 168 (1979). Those standards have been met, and the pleadings are so amended.

In mitigation, I have taken into consideration the fact that the license was posted, which indicates that the respondents were attempting to comply with the statute. They are admonished that in the future all licenses, whether for employees, trainees, applicants, or the shop must be posted in locations in which they are immediately and clearly visible to the public.

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<sup>1</sup> That is the term used by the respondent.

II- 19 NYCRR 161.2 provides that a licensee must affix his or her photograph to the license in the appropriate space. The evidence on this issue is conflicting and unconvincing. The inspector testified that when she was shown the license there was no photograph on it, but her testimony was generally tentative and uncertain, and her recollection of the events, which occurred more than a year ago during what must have been one of many inspections, was far from definite. De Santis, on the other hand, testified that there was a picture affixed to the license. Under these circumstances I find that the complainant has failed to establish by substantial evidence the truth of the charge that a photograph was not affixed to the license. Therefore, that charge must be dismissed. State Administrative Procedure Act §306[1].

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Diana De Santis and Diana and Joe's Dynamic Hair Salon Inc. have violated General Business Law §407[3], and accordingly, pursuant to General Business Law §409[8], they are reprimanded therefore, and

**IT IS FURTHER DETERMINED THAT** the charge that the respondents violated 19 NYCRR 161.2 is dismissed.

These are my findings of fact together with my opinion and conclusions of law. I recommend the approval of this determination.

Roger Schneier  
Administrative Law Judge

Concur and So Ordered on:

GAIL S. SHAFFER  
Secretary of State  
By:

James N. Baldwin  
Executive Deputy Secretary of State